In the Supreme Court of the United States

OCTOBER TERM 1967

No. 477

JAMES L. MORRILL, PETITIONER

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals (Pet. App. 14-15) and of the district court (App. 16a-19a) are unreported.[1]

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[1] Appendix page numbers followed by an "a" refer to the appendix for plaintiff-appellant in the court of appeals. Appendix page numbers followed by a "b" refer to the appendix for defendants-appellees in the court of appeals.

JURISDICTION

The order of the court of appeals was entered on March 15, 1967. A timely petition for rehearing was denied May 12, 1967. The petition for a writ of certiorari was filed August 10, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's discharge was in compliance with Civil Service Commission regulations pertaining to the release of employees pursuant to a reduction in force.

2. Whether the regulations are consistent with Section 12 of the Veterans Preference Act.

STATUTES AND REGULATIONS INVOLVED

Section 12 of the Veterans Preference Act, 5 U.S.C. 861 (1964)[2] provided in relevant part as follows:

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference * * *, length of service, and efficiency ratings * * *.

The regulations governing reduction in force in effect when this case arose are set forth at 26 Fed. Reg. 1811, *et seq.* (Mar. 2, 1961) and are reproduced

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[2] After this case arose, Title 5 was recodified. Section 12 of the Veterans Preference Act now appears, without relevant changes of substance, at 5 U.S.C. 3501-3.

in the brief for defendants-appellees in the court of appeals, pp. 29-33. Section 20.302 of these regulations (presently 5 C.F.R. 351.602 (1964)), provides in relevant part as follows:

> Competing employees shall be selected for release from a competitive level under this part in the inverse order of retention standing, beginning with the lowest standing employee on the retention register.

Section 20.202 (presently 5 C.F.R. 351.404 (1964), provides in relevant part as follows:

> (a) An agency shall establish a retention register whenever a competing employee is to be released from a competitive level under this part.
>
> * * * *
>
> (c) A separate retention register shall be compiled for each competitive level.

Section 20.201(c)(2) (presently 5 C.F.R. 351.403 (b) (1964)) provides in relevant part as follows:

> Separate competitive levels shall be established for competitive positions as distinguished from excepted positions.

STATEMENT

In 1961, the Kentucky State Agricultural Stabilization and Conservation Service (ASCS) Office underwent a reorganization, pursuant to which its staff was reduced from 61 to 48 full-time employees (App. 21b). As part of this reorganization, it was decided that the duties of State Performance Assistant could be performed by temporary employees, rather than by

full-time employees. Under Civil Service Commission regulations, such temporary employees, i.e., employees hired for not more than 180 days each year, are in Schedule A of the excepted service, 5 C.F.R. 213.3113 (a)(5) (1964), and, if non-veterans, have no protection against removal without cause. 5 C.F.R. 752.103 (a)(b), 752.104, 752.201(a)(2) (1964).

Petitioner was an employee of the Kentucky State ASCS Office, holding a full time job as State Performance Assistant. (App. 5b, 42b).[3] In this position petitioner was in the competitive service and entitled to protection of tenure. However, when the duties of his position were transferred to a temporary position in the excepted service, and petitioner was relieved from his full-time position, the Kentucky State ASCS Office chose not to hire petitioner for this temporary position.[4]

Petitioner's basic complaint is that he should have been allowed to replace one of 23 temporary em-

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[3] This job required him, among other things, to "instruct county ASC supervisors and reporters regarding ASC rules and regulations, how to discharge their duties as ASC employees and to check and rate their work." (App. 5b).

[4] Petitioner complained to the Civil Service Commission that "at the time of my termination there were employed by the Kentucky ASCS state office approximately twenty-three (23) persons doing exactly the same type of work that I had done." (App. 25b). However, petitioner also stated that only two of these persons were assigned to territory within commuting distance of his headquarters. Petitioner believed he should have been allowed to replace Mr. Lynn Neal (App. 3b). Mr. Neal himself was released only two months after plaintiff's release, because the temporary job had ended. (App. 41b).

ployees. The Civil Service Commission rejected this complaint, holding that under the regulations employees in the competitive service and employees in the excepted service do not compete for purposes of displacement and re-employment when an agency reorganization takes place. (App. 46b, 47b). The Commission also rejected petitioner's charge that he had been the object of political discrimination. (App. 39b). Both the district court and the court of appeals sustained the action of the Commission and refused to grant petitioner relief, holding that his discharge was in accordance with valid Civil Service regulations.

ARGUMENT

1. Petitioner's discharge conformed to Civil Service regulations. These regulations provided, at the relevant times, that agencies undergoing reorganization must establish a "retention register" listing employees in order of their retention standing (which is determined with reference to their military record, performance rating, tenure of appointment and length of service). Sections 20.201(e), 20.202.[5] When a reorganization occurs, separation of employees must occur in inverse order of their standing on the retention register. Section 20.302. The regulations limit the scope of retention registers by providing a separate register for each "competitive level." Sections

[5] The citations refer to the Retention Preference Regulations set forth at 26 Fed. Reg. 1811 (Mar. 2, 1961). The present regulations, which are substantially similar to those in effect in 1961, are set forth at 5 C.F.R. Part 351 (1964).

20.202(c), 20.302. They require that each competitive level shall consist of positions which are sufficiently alike so that an employee may be moved from one position to another within the competitive level without undue interruption of the work program and "without change in the terms of the incumbent's appointment." Section 20.201(c)(1). This last requirement is implemented by the further provision that "separate competitive levels shall be established for competitive positions as distinguished from excepted positions." Section 20.201(c)(2).

Under these regulations, the Kentucky ASCS Office was fully justified in not granting petitioner displacement or reemployment rights with regard to the temporary position to which the duties of his job were transferred in the agency's reorganization. Under these regulations, petitioner had preference rights only as to jobs in his competitive level. The temporary position of State Performance Assistant was in the excepted service, while petitioner's job had been in the competitive service. The regulations established that competitive positions and excepted positions were not in the same competitive level and, accordingly, did not compete for retention preference in an agency reorganization.

2. Section 12 of the Veterans Preference Act, 5 U.S.C. 861 (1964) (which for present purposes is applicable to non-veterans such as petitioner) provides that "in any reduction in personnel * * *, competing employees shall be released in accordance with Civil Service Commission regulations." The statute does not define the term "competing employees," and

thus it is necessary for the Civil Service Commission to formulate practical distinctions in determining which employees shall compete for jobs in connection with a reduction in the work force. In the present case, the regulations do not give an employee in the competitive service the right to a job in the excepted service. Since an employee in the excepted service has no tenure protection, the right to employment in the excepted service would be meaningless. The Civil Service regulations simply recognize this fact. Section 20.201(c)(2), 5 C.F.R. 351.403 (1964).

The basic damage to petitioner's status was done when the duties of his position were transferred to a temporary position outside the competitive civil service. Contrary to petitioner's assertions, an agency's ability to place jobs outside the competitive service does not vitiate civil service protection for employees in the competitive service. Any such transfer must be approved by the Civil Service Commission, which issues the various schedules listing jobs which are excepted from the competitive civil service. See 5 C.F.R., Part 213. Petitioner has not attacked the determination that the position of temporary State Performance Assistant was properly included in Schedule A of the excepted service.

A further protection for Civil Service employees against arbitrary placement of their jobs in the excepted service lies in the rule that, even if the appropriate procedures are followed, discharges in connection with agency reorganizations will be overturned where it is shown that the procedures followed were

a mere sham, designed to cover a discharge for political motives. See *Pence* v. *Tobriner*, 349 F. 2d 717, 718 (C.A.D.C.). However, no such showing has been made here.

3. There is no conflict of decisions. In the only other decision on point, the Court of Claims upheld the validity of Civil Service Commission regulations prohibiting an employee in the competitive service from "bumping" employees with similar jobs in excepted positions:

> At the time that plaintiff was separated from the Government service there were several attorney positions in the Boston Office. All of these positions were occupied on excepted appointments and not in the competitive service. Section 12 of the Veterans' Preference Act of 1944, 58 Stat. 387, 390, 5 U.S.C.A. § 861, does not give a veteran the right to displace other employees from their jobs where it is necessary to cross competitive levels to do so.

Novogroski v. *United States*, 153 F. Supp. 421, 427 (Ct. Cl.).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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